EDITOR'S NOTE

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92-6033

In the United States
Supreme Court

Supreme Court, U.S.
FILED
SEP 21 1992
OFFICE OF THE CLERK

October Term 1992

No. _____

ORIGINAL

William McNeil,
Petitioner

v.

The United States of America,
Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the
Seventh Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

NOW COMES PETITIONER, WILLIAM MCNEIL AND PETITIONS THIS COURT FOR PERMISSION TO PROCEED IN FORMA PAUPERIS AND THROUGH HIS ATTORNEY STATES AS FOLLOWS:

1. That counsel was appointed by the United States Court of Apppeals for the Seventh Circuit and leave was granted by the United States District Court to appeal in forma pauperis to the United States Court of Appeals for the Seventh Circuit.

2. Leave was sought to proceed in forma pauperis in the United States District Court as well as appointment of counsel. Both the initial motion to proceed in forma pauperis and the motion for appointment of counsel were denied in the District Court.

3. Petitioner remains in custody and his poverty status is unchanged.

4. Counsel has prepared an affidavit in the form proscribed under this court Rule 39 and has requested that said affidavit be executed by Mr. McNeil and sent directly to this court by MrMcNeil.

Allen E. Shoenberger

Allen E.Shoenberger
Court Appointed Counsel
1 E. Pearson Street
Chicago,Illinois 60611

WPP
(9)

312 915 7141

Affidavit

I certify under penalty of perjury that the foregoing is true and correct. Executed on September 18, 1992.

Allen E. Shoenberger

Subscribed to and sworn to before me this
18th day of September, 1992.

OFFICIAL SEAL
KAREN V. KOLE
NOTARY PUBLIC STATE OF ILLINOIS
MY COMMISSION EXP. JULY 18,1994

notary public

Allen E. Shoenberger
Court Appointed Counsel*
Loyola Law School
One East Pearson Street
Chicago, Illinois 60611
312 915 7141

*Counsel of Record

In the United States
Supreme Court

October Term 1992

No. _____

William McNeil,
Petitioner

v.

The United States of America,
Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

Affidavit in Support of Motion to Proceed on Appeal in Forma Pauperis

I, Willaim McNeil, being first duly sworn, depose and say that I am the Petitionr in the above titled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security threfore; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

The issue as stated in the Petition for Certiorari.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? no

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of you last employment and the amount of salary or wages per month which you received.

Oct. 1981 about 1900 per month

2. Have you received within the past twelve months any income

 no

from a business, profession or other form of self employment, or in the form of rent payments, interest dividends or other source? no

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? no

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? no

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

signature: William McNeil
Willaim McNeil

SUBSCRIBED AND SWORN TO BEFORE ME THIS 22 DAY OF September, 1992.

Curtis K. Brady
notary public

" OFFICIAL SEAL "
CURTIS K. BRADY
NOTARY PUBLIC STATE OF ILLINOIS
MY COMMISSION EXPIRES 10/23/95

Allen E.Shoenberger
Court Appointed Counsel
1 E. Pearson Street
Chicago,Illinois 60611
312 915 7141

92-6033

In the United States
Supreme Court

October Term 1992

No. _____

William McNeil,
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The United States of America,
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ORIGINAL

Petition for Writ of Certiorari
to the United States Court of Appeals
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Seventh Circuit

Allen E. Shoenberger
Court Appointed Counsel*
Loyola Law School
One East Pearson Street
Chicago, Illinois 60611
312 915 7141

*Counsel of Record

QUESTION PRESENTED

Whether an incomplete filing of a Federal Tort Claims Act suit may be perfected by filing a notice of final agency denial of the claim prior to substantial progress on the merits?

Parties

The caption contains the names of all the parties below.

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In the United States Supreme Court
October Term 1992

William McNeil,
Petitioner,

v.
The United States of America,
Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the
Seventh Circuit

Petitioner, William McNeil, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Opinions below

The unreported opinion and judgment of the United States District Court of the Northern District of Illinois, William McNeil v. United States Public Health Service, No. 89 C 1822 dismissing the case on January 24, 1991 is reproduced in Appendix A.

The opinion of the United States Court of Appeals for the Seventh Circuit in William McNeil v. United States of America (one Judge dissenting) is reported at 964 F.2d 647 (7th Cir. 1992) and is reproduced in Appendix B along with the judgment.

The order of the United States Court of Appeals for the Seventh Circuit of June 26, 1992 denying Petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc is reproduced in Appendix B.

Statement of Jurisdiction

The opinion of the United States Court of Appeals for the Seventh Circuit affirming the dismissal of the case was filed on May 20, 1992, and amended May 26, 1992. (with Judge Ripple dissenting)

Petitioner's subsequent Motion for Rehearing and Suggestion for Rehearing en Banc was denied by the United States Court of Appeals for the Seventh Circuit on June 26, 1992.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254(1).

Statutory Provisions Involved

The Federal Tort Claims Act, 28 U.S.C. section 2401 (b) reads:

"A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented."

The Federal Tort Claims Act, 28 U.S.C. section 2765 reads:

2675. Disposition by federal agency as prerequisite; evidence

"(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages."

STATEMENT OF THE CASE

On March 6, 1989 Mr. McNeil, a state prisoner in Stateville Correctional Center, Joliet, Illinois, filed suit in the United States District Court for the Northern District of Illinois. In that suit Mr. McNeil alleged that agents of the federal government conducted

AIDS and Hepatitis B experiments upon Mr. McNeil without his consent. Mr. McNeil alleged that these experiments resulted in his contracting hepatitis.

Mr. McNeil received no response to his March 6, 1989 filing which filing was lost in the "crush of prisoner litigation."

On January 17, 1989 Mr. McNeil had sent a letter to the Department of Health and Human Services demanding a sum certain. On January 24, 1989 the Chief Counsel for the Department informed Mr. McNeil that his letter would be forwarded to a Public Health Services claims officer.

On July 7, 1989 Mr. McNeil filed another claim about the same subject in the Department of Health and Human Services. This claim was denied on July 21, 1989.

On August 7, 1989 Mr McNeil filed an affidavit-letter in support of his earlier motion for appointment of counsel (which motion was eventually denied - Mr. Mc Neil was pro se in the District Court). Attached to that affidavit was a copy of the sum certain denial of July 21, 1989. Mr. McNeil's affidavit included the following statement:

"However, under the circumstances that exist here at Stateville Correctional Center, its clearly impossible to file proper motions: therefore, plaintiff prays this Honorable Court accepts this letter as a proper request, whereas plaintiff can properly commence his legal action accordingly."

On September 19, 1990 the Government moved to dismiss alleging that the suit was barred under 28 U.S.C. Section 2401(b).

On January 24, 1991, the District Court granted the government's motion to dismiss, finding that the suit had been filed on March 6, 1989, and thereby had not complied strictly with the Federal Tort Claims Act in that the sum certain denial had not been received prior to filing suit.

This finding was affirmed by the United States Court of Appeals for the Seventh Circuit in its judgment and opinion of May 20, 1992 in part on the basis of this court's decision regarding an analogous filing requirement for environmental laws, Hallstrom v. Tillamook County, 493 U.S. 20 (1989).

A Petition for Rehearing with Suggestion for Rehearing En Banc was filed on May 28, 1992 and is reproduced in Appendix C.

Said Petition suggested inter alia that neither counsel for the government nor Petitioner were aware of Hallstrom v. Tillamook County, and thus that neither had given the Seventh Circuit the benefit of their analysis. The Petition suggested that the legislative history of the Federal Tort Claims Act was considerably different from that of the environmental statutes involved in Hallstrom v. Tillamook County and that this court's decision in Hallstrom v. Tillamook County did not bar petitioners from any access to judicial relief. The Opinion of the United States Court of Appeals for the Seventh Circuit stated that "[i]t is too late" for Mr. McNeil "to file another [case]."

That Petition for Rehearing was denied June 26, 1992.

REASONS FOR GRANTING THE WRIT

This case presents an important and unsettled question

regarding the procedural prerequisite for filing suit under the Federal Tort Claims Act, 28 U.S.C. Section 2675, and gives this court an opportunity to resolve a conflict between the Circuits.

The decision of the United States Court of Appeals in this case added to the conflict between various United States Court of Appeals for various Circuits. The third and eighth circuits, Kubrick v. United States, 581 F.2d 1092 (3rd Cir. 1978), rev'd on other grounds, 444 U.S. 111 (1979), and Celestine v. Veterans Administration, 746 F.2d 1360 (8th Cir. 1984) permit a Federal Tort Claims action to go forward if prematurely filed so long as no substantial progress has taken place in court before the agency has denied the claim and the court is notified of the denial. These Circuits note the duplicitous filings and wasted effort in requiring refiling of a court case when the inclusion of a sum certain denial notice in the court file can cure any technical defect. See also, Abernathy v. United States, 732 F.Supp. 98 (D. Kan. 1990) which adopted the Celestine position.

In the case at bar the Seventh Circuit joined the fifth circuit in rejecting that standard. See, Gregory v. Mitchell, 634 F.2d 199, 204 (5th Cir. 1981), Reynolds v. United States, 748 F.2d 291 (5th Cir. 1984), United States v. Burzynski Cancer Research Institute, 819 F.2d 1301, 1306-07 (5th Cir. 1987). The ninth circuit joined that rejection in its decision of June 11, 1992 of Jerves v. United States, 966 F.2d 517 (9th Cir. 1992).

In this case Mr.McNeil's early filing coupled with the loss of Mr. McNeil's case "in the mass of prisoner litigation" at the District

Court level, combined to bar his day in court. The United States District Court dismissed his action more than two years after it had been filed. The United States moved for dismissal approximately 13 months after Mr. McNeil had included a copy of the agency sum certain denial in his filings in the district court. The loss of his case in the district court in the press of prisoner litigation delayed any dismissal of Mr. McNeil's "prematurely" filed lawsuit until long after the time to refile it had passed. Moreover, the District Court dismissed the case although the agency denial of the sum certain request had been incorporated in the district court file approximately 17 months prior. [Indeed, by the terms of the Federal Tort Claims Act 28, U.S.C. Section 2675 (a) even had Mr. McNeil failed to file the sum certain denial letter as he did on August 7, 1989, at least by August 18, 1989, the six month period for the United States Public Health Service to respond to Mr. McNeil's first demand of January 17, 1989 would have passed and the filing of suit would have been proper.]

While the procedural niceties of the Federal Tort Claims Act may "pose little difficulty for the knowledgeable inmate accustomed to grievances and court actions....[T]hey are a likely trap for the inexperienced and unwary inmate, ordinarily indigent and unrepresented by counsel, with a substantial claim." McCarthy v. Madigan, ___ U.S. ___, 112 S.Ct. 1081, 1090, 117 L.Ed.2d 291 (1992) (Bivens action, comment relates to exhaustion of intra prison grievance mechanism).

Whether a narrow procedural construction of the Federal Tort Claims Act for prematurely filed suits is consistent with Congressional intent for a statute reflecting "Congress's clear

intent, as in the context of the 'sweeping language' of the Federal Tort Claims Act...." United States v. Nordic Village Inc., ___ U.S. ___, 112 S.Ct. 1011, 1014, 117 L.Ed.2d 181 (1992), (citing inter alia, United States v. Yellow Cab Co., 340 U.S. 543, 547, 554-555 (1951)) to broadly waive sovereign immunity is a question important enough to receive this court's answer.

The Federal Tort Claims Act is an important statute. The instant case involves the ability of citizens, unlearned in the law, to litigate civil claims against the Federal Government.

Apparent injustice to F.T.C.A. plaintiffs disserves the interests of citizens of the United States and flies in the face of the sweeping waiver of sovereign immunity intended by Congress when the F.T.C.A. was enacted. It is particularly unjust in this case, for as the opinion for the United States Court of Appeals for the Seventh Circuit notes, it is now too late for Mr. McNeil to refile his case.

Conclusion

For these reasons the Petitioner respectfully requests that this court grant a writ of certiorari to the United States Court of Appeals for the Seventh Circuit

Respectfully submitted,

Allen E. Shoenberger
One East Pearson
Chicago, Ill. 60611
312 915 7141

September 17, 1992

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM McNEIL,

Plaintiff,

v.

UNITED STATES PUBLIC HEALTH SERVICE,

Defendant.

No. 89 C 1822

JUDGE JAMES H. ALESIA

DOCKETED
JAN 25 1991

MEMORANDUM OPINION AND ORDER

William McNeil brings this action seeking damages against the United States Public Health Service ("the government") under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671, et seq. ("the FTCA"). The pro se complaint charges the government with conducting experiments on prisoners at the Stateville Correctional Center without first obtaining permission from the prisoners. The experiments allegedly were designed to study the spread of infectious diseases among inmates. McNeil asserts he was exposed to AIDS as a result of the experiments and the government's negligence. He requests twenty million dollars in damages. The government has moved to dismiss the complaint for lack of subject matter jurisdiction. For the reasons that follow, the court grants the motion.

The government's motion is based on two limitations periods contained in the FTCA. The first statute, 28 U.S.C. § 2401(b), governs the time for commencing an FTCA suit. It provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after

APPENDIX A

such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

The second statute, 28 U.S.C. § 2675(a), imposes a requirement that the claimant exhaust his administrative remedies before commencing suit under the FTCA. It states, in pertinent part:

> An action shall not be instituted upon a claim against the United States for money damages...unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section....

The effect of these statutes is to require a claimant to file an administrative claim before commencing suit under the FTCA. The administrative claim must be filed within two years of the time the claim accrued. If the claim is denied, the claimant has six additional months to file his FTCA suit. If the agency does not act on the claim within six months, the claimant has the option of commencing suit without a final disposition of his administrative claim.

McNeil presented his FTCA case to the court on March 6, 1989. A motion for leave to file in forma pauperis accompanied the complaint. The court ordered ruling on the in forma pauperis motion held in abeyance on June 12, 1989. On July 7, 1989, McNeil filed his administrative claim with the Department of Health and Human Services. The administrative claim was denied in a letter dated July 21, 1989. The letter notified McNeil that he had six months to file an FTCA suit. Meanwhile, the complaint McNeil had sent to the court in March got lost in the crush of prisoner litigation filed in this

district. On April 15, 1990, McNeil paid the filing fee and his complaint was formally filed.

Citing the date McNeil paid the filing fee, the government's motion to dismiss argues that the court lacks jurisdiction over McNeil's claim because he filed the suit more than six months after the denial of his administrative claim. In his responsive brief, McNeil contests the date the government relies on for the filing date of this case. He urges that he commenced suit on March 6, 1989, the day the Clerk assigned it a docket number. The government, in reply, notes that this alternative date does not cure the jurisdictional defect. McNeil did not file his administrative claim until July 1989. The government maintains that if the court accepts McNeil's argument that the March 1989 date is the proper date of filing, it still must dismiss the action, not because McNeil filed his FTCA suit tardily, but rather because he commenced it prematurely.

The first issue the court must decide then is the date of filing for purposes of determining the limitations period. The answer to this question is found in Smith-Bey v. Hospital Administrator, 841 F.2d 751 (7th Cir. 1988). The court there noted "the generally accepted rule that a complaint is deemed 'filed' within the meaning of Fed.R.Civ.P. 3 for purposes of invoking the court's jurisdiction over an action when it is placed in the custody of the district court clerk." Id. at 757 n.5. Thus, the operative date of filing in this case is not the day McNeil paid the filing fee, but rather the day he lodged his complaint with the court and filed his motion asking for leave to file without prepayment of the filing fee. In short, McNeil commenced his suit on March 6, 1989.

The federal court has no jurisdiction to entertain a FTCA suit commenced before satisfaction of the administrative exhaustion requirement under § 2675(a). Charlton v. United States, 743 F.2d 557, 558-59 (7th Cir. 1984); Erxleben v. United States, 668 F.2d 268, 270-71 (7th Cir. 1981). In light of the statutory restrictions Congress has placed on judicial authority to hear FTCA claims against the United States, courts consistently have dismissed for lack of jurisdiction suits brought either without prior attempt to file an administrative claim, e.g., Best Bearings Co. v. United States, 463 F.2d 1177 (7th Cir. 1972), or after expiration of the six-month period an agency is allotted to make a final determination on an administrative damage claim. E.g., Charlton, supra. Between these two extremes, however, lies a third category of cases, a category into which McNeil's case falls. Although McNeil's case was premature at the time of filing, he had exhausted his administrative remedies by the time the government filed its motion to dismiss. The courts have split on their treatment of cases where plaintiff has exhausted his administrative remedies during the pendency of the FTCA suit.

In Celestine v. Veterans Administration Hospital, 746 F.2d 1360 (8th Cir. 1984), the Eighth Circuit permitted an FTCA suit to proceed even though plaintiff had not filed his administrative claim prior to commencing his complaint in federal court. The government moved to dismiss the complaint for lack of jurisdiction soon after it was filed. The district court, however, did not rule on the motion until eighteen months later. In the meantime, unbeknownst to the court, the plaintiff had filed for and been denied relief by the appropriate administrative agency. The Eighth Circuit reversed dismissal of the action, holding that the requirements of § 2675(a) were met if the plaintiff had exhausted his

administrative remedies before "any substantial progress had been made on the case." Id. at 1362. Citing Kubicki v. United States, 591 F.2d 1092 (3d Cir. 1979), rev'd on other grounds, 444 U.S. 111 (1979), the court reasoned that it would be a waste of effort to dismiss the case and require refiling when it was clear that the plaintiff had exhausted his remedies at the time of the district court's decision. Id. Contrary to the position of the Eighth and Third Circuits, the Fifth Circuit has refused to construe § 2675(a) to allow courts to accept jurisdiction over suits filed before expiration of the six-month waiting period. In Reynolds v. United States, 748 F.2d 291 (5th Cir. 1984), plaintiff had filed her FTCA complaint four months after she had filed her administrative claim. Although the administrative agency had denied the plaintiff's claim by the time the district court dismissed her suit, the Fifth Circuit held that this was not enough to save the action from dismissal for lack of jurisdiction. "[S]uits against the government under the FTCA must be filed in strict compliance with its provisions." Id. at 292. The FTCA mandates exhaustion of administrative remedies as a jurisdictional predicate to the filing of suit under the FTCA. Thus, for jurisdiction to exist, it must exist at the time of filing. Because plaintiff had not received a final determination of her administrative claim at the time she filed her suit, Reynolds concluded that the district court lacked subject matter jurisdiction at the outset, a defect that could not be cured by a subsequent exhaustion of administrative remedies. Id.

The equities may weigh in favor of McNeil, but the court finds itself persuaded by the reasoning of the Fifth Circuit. Moreover, although it has not spoken directly to the issue, the Seventh Circuit generally has opted for strict construction of jurisdictional

requirements of the FTCA. As it explained in Charlton, 743 F.2d at 558, "[t]he Federal Tort Claims Act is a congressional waiver of sovereign immunity, and a plaintiff's failure to comply with the requirements of the Act leave the plaintiff with no forum for his or her claim." Statutory conditions limiting the terms of the government's consent to be sued as sovereign must be strictly construed. United States v. Kubrick, 444 U.S. 111, 117-18 (1979). The conditions cannot be waived. Erxleben, 668 F.2d at 271. Nor are they subject to the same equitable considerations that might apply in litigation between private parties. Houston v. United States Postal Service, 823 F.2d 896, 902 (5th Cir. 1987), cert. denied, 485 U.S. 1006 (1988). McNeil did not comply with the condition that he exhaust his administrative remedies prior to bringing this action. While dismissal at this time effectively will leave him without any means to pursue his claim against the government further, this court cannot overlook the effect of his premature filing.

In Cooper v. United States, 442 F.2d 908 (7th Cir. 1971), a plaintiff filed an FTCA suit four months after he had filed an administrative claim for damages with the Attorney General of the Untied States. Although the court affirmed dismissal on grounds that plaintiff had commenced the suit more than two years after his claim accrued, it also indicated that the court could properly have dismissed the suit for failure to exhaust administrative remedies since plaintiff had jumped the gun in filing his suit before the mandatory six-month period had elapsed. Id. at 911. The court remarked that limitations periods conditioning a waiver of sovereign immunity should be liberally construed in favor of repose. Id. at 912. If under Cooper it is proper to dismiss a FTCA action brought only four months after the filing of an administrative claim, it follows that a FTCA

complaint filed in federal court before the administrative claim is even filed must also be dismissed.

Accordingly, finding that it lacks subject matter jurisdiction, the court grants the government's motion and directs the clerk to enter judgment dismissing this case in its entirety.

JAMES H. ALESIA
United States District Judge

Dated: JAN 24 1991

AO 450 (Rev. 5/85) Judgment in a Civil Case

United States District Court

NORTHERN DISTRICT OF ILLINOIS

Eastern Division

DOCKETED

JAN 28 1991

William McNeil

JUDGMENT IN A CIVIL CASE

V.

United States Public Health Service

CASE NUMBER: 89 C 1822

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Court finds that it lacks subject matter jurisdiction over this action. The defendant United States Public Health Service's motion to dismiss is granted, and the clerk is directed to enter judgment dismissing this case in its entirety.

Sent for Microfilming

JAN 28 1991

Filmed JAN 29 1991

January 24, 1991

Date

H. STUART CUNNINGHAM

Clerk

Darrel L. Wiley

(By) Deputy Clerk

25

U.S. GOVERNMENT PRINTING OFFICE: 1985—608 062

nature of the Guidelines sentencing process is again unhappily reflected in this case, resulting in what the district court and, I believe, my colleagues understandably recognize to be a harsh sentence. The district judge sentenced Andruska to 42 months imprisonment, hardly a slap on the wrist. The Guidelines calculation is 97–121 months although the statutory maximum specified in 18 U.S.C. § 1071 under which she was convicted is 60 months. Unfortunately, under the Guidelines, neither the district judge nor we appear to have discretion to impose a reasonable sentence. The serious defects and injustice in the Guidelines sentencing process have been noted by a number of courts, most comprehensively in the concurring opinion of Judge Edwards in *United States v. Harrington*, 947 F.2d 956, 962–70 (D.C.Cir.1991). I join in the disposition here, unhappy though I believe it to be, because Congress and the Sentencing Commission have foreclosed a more just result.

West Publishing Co. KEY NUMBER SYSTEM

William McNEIL, Plaintiff–Appellant,

v.

UNITED STATES of America, Defendant–Appellee.

No. 91–1303.

United States Court of Appeals, Seventh Circuit.

Argued April 27, 1992.

Decided May 20, 1992.

As Amended May 26, 1992.

Rehearing and Rehearing En Banc Denied June 26, 1992.

Inmate appealed from order of the United States District Court for the Northern District of Illinois, James H. Alesia, J., dismissing his Federal Tort Claims Act (FTCA) action challenging prison conditions. Court of Appeals, Easterbrook, Circuit Judge, held that when administrative claim is denied before any substantial progress has been made in pending litigation, FTCA suit must be refiled to be effective.

Affirmed.

Ripple, Circuit Judge, filed dissenting opinion.

1. United States ⇐127(2)

When administrative claim is denied before any substantial progress has been made in pending litigation, Federal Tort Claims Act suit must be refiled to be effective. 28 U.S.C.A. §§ 2401(b), 2675(a).

2. United States ⇐140

Inmate's letter protesting prison conditions and requesting counsel following denial of his damages claim by the Department of Health and Human Services was not a complaint necessary to satisfy Federal Tort Claims Act's filing requirements. 28 U.S.C.A. §§ 2401(b), 2675(a); Fed.Rules Civ.Proc.Rules 3, 8, 28 U.S.C.A.

Allen E. Shoenberger, Chicago, Ill. (argued), for plaintiff-appellant.

Eileen M. Marutzky, Jack Donatelli (argued), Asst. U.S. Attys., Office of the U.S. Atty., Civil Div., Appellate Section, Chicago, Ill., for defendant-appellee.

Before CUMMINGS, EASTERBROOK, and RIPPLE, Circuit Judges.

EASTERBROOK, Circuit Judge.

William McNeil is a prisoner of Illinois. In March 1989 he filed this action under the Federal Tort Claims Act, contending that the prison had compelled him to participate in experiments conducted or financed by the United States Public Health Service. One of these experiments, McNeil alleged, was to share a cell with another prisoner who has AIDS. He demanded $20 million in damages.

Among the suit's problems was McNeil's failure to pursue administrative remedies as the FTCA requires. 28 U.S.C. § 2675(a).

APPENDIX B

McNeil filed a claim in June, seeking $500,000 on the assertion that he had contracted hepatitis and been exposed to AIDS. The Department of Health and Human Services denied this claim on July 21, 1989. Instead of commencing a new suit, McNeil sought assistance in the existing one, attaching the administrative decision to a request filed in August 1989 for the appointment of counsel. The district judge eventually dismissed the action on the ground that it had been filed too soon. It is too late to file another.

According to 28 U.S.C. § 2401(b), a tort claim against the United States must be "begun within six months after the date of mailing ... of notice of final denial of the claim by the agency to which it was presented." The administrative denial was mailed on July 21, 1989, so McNeil had between then and January 21, 1990, to begin his action. The complaint filed in March 1989 was too early. This left two options. Perhaps the document filed in March 1989 loitered on the docket, springing into force when the agency acted. Or perhaps the request for counsel in August 1989, during the six-month period, marks the real "beginning" of the action. The district court rejected both options, and McNeil, with the assistance of counsel appointed by this court, renews the arguments here.

[1] Two courts of appeals have held that when "the administrative claim is denied before any substantial progress has been made in the pending litigation, the suit need not be refiled to be effective.... To hold that refiling was necessary would involve duplicitous pleadings and wasted effort." *Kubrick v. United States*, 581 F.2d 1092, 1098 (3d Cir.1978), reversed on other grounds, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979). Accord, *Celestine v. Veterans Administration*, 746 F.2d 1360, 1363 (8th Cir.1984). One circuit has gone the other way. *Gregory v. Mitchell*, 634 F.2d 199, 204 (5th Cir.1981); *Reynolds v. United States*, 748 F.2d 291 (5th Cir.1984); *United States v. Burzynski Cancer Research Institute*, 819 F.2d 1301, 1306–07 (5th Cir.1987). Make that two: we join the fifth circuit.

Neither the third nor the eighth circuit discussed the language of § 2675(a): "An action shall not be instituted upon a claim against the United States for money damages ... unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing" or six months have passed without decision. This statute does not authorize suits or postpone adjudication of suits; it forbids the institution of suits prior to the administrative decision. Judges of two circuits believe that Congress erred in writing a prohibition, but that does not explain why the statute Congress actually enacted may be disregarded.

Many statutes have a structure similar to § 2675(a), most prominently the environmental laws. *Hallstrom v. Tillamook County*, 493 U.S. 20, 110 S.Ct. 304, 107 L.Ed.2d 237 (1989), considers a typical provision, in the Resource Conservation and Recovery Act of 1976: "No action may be commenced ... prior to 60 days after the plaintiff has given notice of the violation" to various persons. 42 U.S.C. § 6972(b)(1). Some courts read this language just as the third and eighth circuits treat § 2675(a): The plaintiff may file the suit any time, but the litigation must remain inactive on the docket during the 60 days reserved for negotiation. The Supreme Court disagreed, holding that "[n]o action may be commenced" means that "[n]o action may be *commenced*", not that "[n]o action may be *prosecuted*". Section 2675(a) is no less insistent that "[a]n action shall not be *instituted*" before the administrative action (or six months of administrative inaction). *Hallstrom* observes that negotiation may be more effective if there is not already a lawsuit on file; that observation is no less true of the FTCA than of the RCRA. And § 2675(a), as a condition on access to the Treasury, is a prime candidate for literal interpretation, see *Kubrick*, 444 U.S. at 117–18, 100 S.Ct. at 356–57, more so than fetters on litigation against persons despoiling the environment. *Hallstrom* ordains the interpretation of § 2675(a).

[2] March 1989 was too early. The suit did not linger, awaiting administrative action. Unless McNeil began a fresh suit within six months after July 21, 1989, he loses. The only candidate is the collection of materials filed in August 1989: a letter protesting conditions in the prison and implicitly requesting counsel, an "Affidavit in Support of Motion for Appointment of Counsel" (although there was no motion), a statement of the balance in McNeil's prison trust account ($2,117.61), and a copy of the administrative decision plus a cover letter from the agency. McNeil's lawyer contends that the complaint of March was not begun until these documents "perfected" the filing. Yet Fed.R.Civ.P. 3 says that "[a] civil action is commenced by filing a complaint with the court." A complaint, not a request for a lawyer, begins the action. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 104 S.Ct. 1723, 80 L.Ed.2d 196 (1984). McNeil's contention that the set of documents "perfected" the action repackages his submission that the suit lingered, awaiting activation by the administrative action. This variation meets the fate of the theme.

Only if the letter was itself a complaint does the submission satisfy the statute. *Baldwin County Welcome Center* holds that the combination of a request for counsel plus an administrative decision (there, a letter from the EEOC giving the person the right to file suit under Title VII of the Civil Rights Act of 1964) does not satisfy Fed. R.Civ.P. 8 and hence is not a complaint. By contrast, a letter narrating the facts and making a claim for relief may be a complaint. *Pearson v. Gatto*, 933 F.2d 521, 526–27 (7th Cir.1991). Where does McNeil's letter fall on this spectrum? We need not decide, for McNeil did not characterize the letter as a complaint in the district court (where he represented himself) or here (where a professor of the Loyola School of Law is serving as his counsel). Whatever scope the doctrine may have in civil litigation, see *Deppe v. Tripp*, 863 F.2d 1356 (7th Cir.1988), it was not plain error in light of *Baldwin County Welcome Center* to treat this document as what it purported to be—a request to get on with a pending case, rather than a new complaint. *Baldwin County Welcome Center* holds that a person who receives a notice from an agency telling him exactly what to do (file a complaint) has no equitable claim to lenient treatment when he chooses to do something else. Just so here.

AFFIRMED.

RIPPLE, Circuit Judge, dissenting.

In my view, we need not resolve in this appeal the difficult issue of whether a Federal Tort Claims Act suit must be refiled when the administrative claim is denied before any substantial progress has been made in the pending litigation. That issue has divided the courts of appeals and certainly deserves resolution by the Supreme Court of the United States. The Court took note of the issue in 1979 but explicitly declined to resolve it. *See United States v. Kubrick*, 444 U.S. 111, 115 n. 4, 100 S.Ct. 352, 356 n. 4, 62 L.Ed.2d 259 (1979).

Here, it is clear that the plaintiff, a prisoner proceeding pro se, attempted to refile the action after the denial of the administrative claim. On August 7, 1989, he wrote to the district court. His letter sets forth the gravamen of his complaint against the Public Health Service, asks the court to accept "this letter as a proper request, whereas plaintiff can properly *commence* his legal action accordingly." (Emphasis supplied). Under the circuit's holding in *Pearson v. Gatto*, 933 F.2d 521, 526–27 (7th Cir.1991), this letter serves as an adequate complaint.[1]

ORDER

Plaintiff-Appellant filed a petition for rehearing and suggestion of rehearing en banc on May 28, 1992. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED. Judge Flaum did not participate in the consideration or decision of this case.

1. I respectfully differ with my colleagues as to whether Mr. McNeil raised this issue adequately

UNITED STATES of America, Plaintiff-Appellee,

v.

Darryl TIPTON, Defendant-Appellant.

No. 90-3649.

United States Court of Appeals, Seventh Circuit.

Argued Sept. 12, 1991.

Decided May 20, 1992.

Defendant was convicted in the United States District Court for the Northern District of Illinois, James B. Zagel, J., of embezzlement and evading federal income tax, and he appealed. The Court of Appeals, Coffey, Circuit Judge, held that: (1) lay testimony identifying defendant's handwriting or signature on phony documents was admissible; (2) prosecutor did not misstate law concerning presumption of innocence in course of closing argument; and (3) prosecutor did not comment of defendant's failure to testify at trial in violation of Fifth and Fourteenth Amendment due process rights.

Affirmed.

1. **Criminal Law** ⇐469.2, 1153(1)

District court has broad discretion in deciding whether to admit expert testimony, and its determination will be affirmed unless manifestly erroneous. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

2. **Criminal Law** ⇐478(2)

Qualification of handwriting expert is sufficient if expert testifies to related experience, knowledge, or training. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

3. **Criminal Law** ⇐491(1)

District court did not abuse its discretion in admitting testimony of expert witness in area of forensic document examination identifying defendant's handwriting or signature on phony documents.

4. **Criminal Law** ⇐452(4)

Lay testimony identifying defendant's handwriting or signature on phony documents, as part of prosecution for embezzlement and tax evasion, was admissible where witness was familiar with defendant's handwriting and signature as result of observing many documents prepared by defendant. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

5. **Criminal Law** ⇐717

Prosecutor's comment on evidence in closing argument, prefaced with reference to government's case, merely related to inferences to be drawn from evidence to rebut presumption of innocence and did not misstate law concerning presumption of evidence.

6. **Criminal Law** ⇐721(3)

Prosecutor's allusion to what defendant in embezzlement prosecution would have said to FBI agent if defendant were to take position that he had inspected work of all contractors was not reference to defendant's failure to testify and thus did not violate defendant's Fifth and Fourteenth Amendments rights. U.S.C.A. Const. Amends. 5, 14.

7. **Criminal Law** ⇐1159.2(2, 7)

Defendant attacking sufficiency of evidence has heavy burden and appellate court may overturn verdict only if record contains no evidence, regardless of how it is weighed, from which jury could find guilt beyond reasonable doubt.

8. **Embezzlement** ⇐44(1)

Internal Revenue ⇐5299

Testimony that defendant had engaged in fraudulent payout scheme involving money from Department of Housing and Urban Development (HUD), that documents involving transfer of funds from

in this court. *See* Appellant's Br. at 7. The government shares my view. *See* Supplemental Government Br. at 4. Nor, given the standards of pleading to which we hold incarcerated pro se litigants, do I believe that the characterization of the document as a complaint was "waived" in the district court. Mr. McNeil made one point clear to the district court in August 1989: despite the difficulties of filing papers with the court from Stateville Correctional Center, he was attempting to "commence his legal action."

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: May 20, 1992

BEFORE: **Honorable** Walter J. Cummings, Circuit Judge

Honorable Frank H. Easterbrook, Circuit Judge

Honorable Kenneth F. Ripple, Circuit Judge

No. 91-1303

WILLIAM MCNEIL,
Plaintiff - Appellant

v.

UNITED STATES OF AMERICA,
Defendant - Appellee

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 89 C 1822, Judge James H. Alesia

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this court that the judgment of the District Court is **AFFIRMED**, with costs, in accordance with the decision of this court entered this date.

(1061-030690)

In the United States Court of Appeals
for the
Seventh Circuit

Case No. 91-1303

William McNeil, Plaintiff-Appellant,	
v.	Appeal from the United States District Court Northern District of Illinois Judge James H. Alesia, Presiding
The United States Public Health Service, Defendant-Appellee.	

Petition for Rehearing
with
Suggestion for Rehearing en Banc

U.S.C.A - 7th Circuit
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APPENDIX C

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In the United States Court of Appeals
for the
Seventh Circuit

Case No. 91-1303

William McNeil, Plaintiff-Appellant, v. The United States Public Health Service, Defendant-Appellee.	) Appeal from the) United States District Court) Northern District of Illinois) Judge James H. Alesia,) Presiding

Petition for Rehearing
with
Suggestion for Rehearing en Banc

This is a case of exceptional importance. The decision rendered on May 20, 1992 created a conflict between this court of appeals and several other courts of appeals as recognized by the slip opinion at p. 2. Moreover, it involves an important statute, the Federal Tort Claims Act, and the ability of citizens, unlearned in the law, to litigate civil claims against their own Federal Government.

In days of widespread citizen contempt for government, exemplified by the riots in Los Angeles and reactions to the house bank overdraft scandal, judicial enactment of a special exemption for the federal government from suit, is shocking. Such a special exemption is both unjust and contrary to any expressed Congressional intent.

It is particularly unjust in this case, for as the slip opinion notes, it is now too late for the Mr. McNeil to file

another case. On May 20, 1992 this court denied Mr. McNeil his day in court. His error was to file too soon. His early filing prevented him from having any opportunity to prove that agents of the federal government conducted AIDS and Hepatitis B experiments upon Mr. McNeil without his consent. Mr. McNeil alleged that these experiments resulted in his contracting hepatitis. McNeil's early filing coupled with the loss of Mr. McNeil's case "in the mass of prisoner litigation" at the District Court level, combine to bar his day in court. The loss of his case in the district court delayed any dismissal of his "prematurely" filed lawsuit until after the time to refile it had long passed. A layperson upon hearing McNeil's story might believe that the federal legal system is engaged in a conspiracy to deny justice to Mr. McNeil, perhaps as part of a "coverup." Such apparent injustice to F.T.C.A. plaintiffs disserves the interests of citizens of the United States.

Plaintiff-Appellant also asserts as a reason for requesting rehearing that at oral argument on April 27, 1992 the court raised several cases (including in particular Hallstrom v. Tillamook County, 493 U.S. 20 (1989)) with which neither the attorneys for the government nor the plaintiff were familiar. Thus neither party in this case has given the court the benefit of their analysis of these cases.

In addition, questions were asked at oral argument regarding the legislative history of the F.T.C.A.; questions that were answered by neither side. This case presents a serious question of federal statutory interpretation upon which the

decision by this court should be as informed as possible.

I. Hallstrom v. Tillamook County is distinguishable; the Supreme Court did Not Bar the Suit, for It Noted that the Suit Could be Refiled

A. Hallstrom is Distinguishable

Each of the statutes referred to by Justice O'Connor's opinion for the court in Hallstrom v. Tillamook County, 493 U.S. 20, 107 L.Ed. 2d 237, 110 S.Ct. 304 (1989) are environmental statutes patterned after the Clean Air Amendments of 1970. See n. 1, at 493 U.S. 22, 110 S.Ct. 307, 107 L.Ed. 2d 244 (1989). The 1970 Act does not appear to have been patterned in any way after the Federal Tort Claims Act. Instead RCRA (the Resource Conservation and Recovery Act) exemplifies completely separate legislative development from that of the F.T.C.A. which was originally enacted in 1946.

The relevant language of the RCRA statute was: "No action may be commenced under paragraph (a)(1) of this section (1) prior to sixty days after the plaintiff has given notice of the violation A) to the Administrator of the EPA, B) to the state in which the alleged violation occurs; and C) to any alleged violator of such permit, standard, regulation, condition, requirement, or order,...." 42. U.S.C. Section 6972(b)(1) (1982 ed.) (emphasis added)

That language is different from the F.T.C.A. language, "An action shall not be instituted upon a claim ... 28 U.S.C. s. 2675 (a). (emphasis added)

In Hallstrom the Supreme Court pointed out that the word "commenced" was identical to the language of Rule 3 of the

Federal Rules of Civil Procedure that states "a civil action is commenced by filing a complaint with the court." 493 U.S. 26, 107 L.Ed.2d 246. The Supreme Court read the language of RCRA "in light of this rule." 493 U.S. 26, 107 L.Ed.2d 246.

In Hallstrom the Supreme Court also observed that Congress had explicitly carved out an exception from the RCRA bar on prematurely filed suits by 1984 amendments to RCRA, See, e.g. 42 U.S.C. s. 6972(b)(1)(A)(1982 ed.), but the court pointed out that no exception applied to the situation in Hallstrom and the court asserted no ability to carve out an exception when Congress had declined to do so. 493 U.S. 27, 107 L.Ed.2d 246.

Moreover, the court pointed out in Hallstrom that the case had been filed by a lawyer (indeed, a lawyer who at oral argument in the Supreme Court admitted his inadvertent neglect in failing to notify the state and federal agencies), as were most RCRA lawsuits. [McNeil proceeded pro se.]

Other factual distinctions exist as well. Negotiation between state and federal governments and RCRA site polluters involve more parties than do F.T.C.A. negotiations. Such negotiations are quite important in RCRA and CERCLA environmental cases. F.T.C.A. negotiations occur infrequently, they certainly did not occur with Mr. McNeil. A delay in suit for only 2 months in RCRA cases is likely to have quite a different practical impact from a 6 month delay in all F.T.C.A. cases. Different delay periods suggest different, not similar, Congressional objectives.

B. The Supreme Court Decision in Hallstrom did not deny

petitioners a day in court

Most importantly, however, the Supreme Court in Hallstrom stated, "Nor will the dismissal of this action have the inequitable result of depriving petitioners of their "right to a day in court. . . . Petitioners remain free to give notice and file their suit in compliance with the statute to enforce pertinent environmental standards." 493 U.S. 32, 107 L.Ed. 2d 250. Nor is this right hypothetical, for the pollution site in Hallstrom is unlikely to disappear overnight (unlike Mr. McNeil's case).

II. Legislative History Supports a Practical Construction of the Federal Tort Claims Act

There is limited legislative history regarding the Federal Tort Claims Act matter at issue in this case. Relevant (and fairly contemporaneous (1948 and 1949)) discussion exists in Congressional committee reports which advocated passage of similar notice requirements in areas of law comparable to F.T.C.A. litigation as well as during Congressional Committee discussion of the F.T.C.A. statute of limitations provision.

Senate Report 80-1593 (1948), a report of the 80th Congress regarding an Admiralty bill (H.R. 238), suggested a similar waiting period for certain admiralty claims under the Public Vessels Act or Suits in Admiralty Act: i.e. delaying a suit until 6 months had passed after the claim had been presented in writing. The Federal Tort Claims Act provision (which then applied only to claims under $1,000) was cited as a model, with the reasons for such a delay stated as follows:

"It is thought that such a provision would be salutary in avoiding unnecessary litigation and would constitute a financial saving both to the claimant and to the United States." (S.Rep. 80-1593, p. 11, P.L. 80-695, Admiralty Jurisdiction -Extension (1948) 1948 WL 1837 Leg. Hist.) (House Report 80-1523, March 8, 1948; and Senate Report 80-1593, June 11, 1948) On the previous page the committee report indicated that the reason for delaying litigation was to "afford the Federal Agency an opportunity to adjust the claim prior to the filing of any suit." Thus a six month opportunity to adjust the claim was given to the federal agencies after receiving a written claim. The committee remarked that, "In the usual case of damage to land structures, there is no question of liability and the situation makes very desirable the availability of an opportunity for settlement and adjustment without litigation."

As a legal and practical matter, each of the reasons cited by this Senate Report (actually a report employed both in the Senate and the House) has either been accomplished in the case at bar by this time of Mr. McNeil's August filing or else is inapplicable to his case (maritime crashes into land structures having nothing to do with the case.)

Congress demonstrated conscious intention to make F.T.C.A. litigation more like ordinary civil litigation when it expanded the time to institute suit under the F.T.C.A. See, House of Representatives Report 81-276, P.L. 81-55, Federal Tort Claims Act - Time for Bringing Suit, 81st Congress, 1st Sess., 1949 WL 1677 (Legis. Hist.) (March 21, 1949) (Only Report on this

legislation) The reported bill (inter alia) enlarged the time for filing suit from 1 year to 2 years from the date of accrual of an action. In justification of the changes proposed (which were enacted in 1949), the report stated:

> "The committee feel that, in comparison to analogous State and Federal statutes of limitation, the existing 1-year period is too short and tends toward injustice in many instances. For example, an analysis of the statutes of limitation of the 48 States and the District of Columbia reveals that the average limitation period provide for personal injury cases is 2.96 years, for property damage claims it is 3.90 years, and for cases of death by wrongful act it is 1.90 years. The over-all combined average is, accordingly 2.92 years, and this over-all average is the one to which the Tort Claims Act limitation should be compared with since the Tort Claims Act covers all three types of torts under one inclusive period of limitation. . . . . Federal statutes providing time limitations for the bringing of tort actions indicate an over-all average of 2.2 years. . . . . It will be observed, then, from the foregoing statistics, that the existing 1 year limitation is manifestly unjust and not in consonance with the practice prevailing in analogous departments of the law." (1949 WL 1677, pp. 3-4)

To various federal agencies that opposed the change on grounds that it would "jeopardize the defenses of the Government in tort suits" the committee report replied, "No clear distinction can be seen between the accessibility of defenses to the Government than to ordinary law or private defendants." (1949 WL 1677, p. 5)

The report concluded with a paragraph as follows:

> "It is not the intention of the Federal Government to deprive tort claimants of their day in court or of their remedies. Nor, on the other hand, does it propose to encourage delay in the enforcement of a claimant's rights or to harass the Federal agencies in their defense against such suits by increasing the difficulty of their procurement of evidence. . . . The period of 2 years proposed in the bill represents a happy medium which has been tested and found satisfactory in the laboratory of legal experience." (1949 WL 1677, pp 5-6.)

The sense of the Congressional Committee Report is that F.T.C.A. suits against the federal government should be as similar as possible to suits against ordinary defendants. The federal government was not supposed to receive special defenses, procedural defenses in particular, that were not available to other defendants.

Rejection of the arguments presented to this court on behalf of Mr. McNeil would have just the effect that the Congressional Committee report abjured; Mr. McNeil would be denied his day in court and the federal government would have a "special defense." It would not be enough to "cut square corners" when dealing with the federal government, those corners would have to be cut in particular and precise order (clockwise - o.k. suit proceeds; counterclockwise - no! Go back and do it again!) Not one shred of legislative history supports converting F.T.C.A. litigation into grand games of "Mother May I."

III. The Practical Interplay of the Statute of Limitations and Pre-suit Notice Requirements under the Federal Tort Claims Act Suggest no Technical Bar was Intended by the Notice Requirement

The statute of limitations and the requirement of notifying a federal agency 6 months prior to filing suit originated in the development of two particular statutory sections, current sections 28 U.S.C. sec. 2401 b) and 2675. If one considers historical development of both sections, there is nothing supporting a "hypertechnical" requirement reading given by this court, rather, a practical, common sense interpretation appears more consonant with Congressional conception of the

purposes of the F.T.C.A. [Indeed, it its first, limited appearance (suits below $1,000) the first "six month" period extended the time to file suit beyond the statute of limitations, it did not limit suit.]

Since Mr. McNeil has fully complied with all substantial and substantive requirements of the F.T.C.A. his suit should proceed.

A: Section 2401 b) statutory development

The origin of the current text of the Federal Tort Claims Act Section 2401 b) began with section 420, 60 Stat. 845 (79th Cong. 2nd sess) August 2, 1946 which read as follows:

> "Every claim against the United States cognizable under this title shall be forever barred, unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, it is presented in writing to the Federal agency out of whose activities it arises, if such claim is for a sum not exceeding $1,000; or unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, an action is begun pursuant to part 3 of this title. In the event that a claim for a sum not exceeding $1,000 is presented to a Federal agency as aforesaid, the time to institute a suit pursuant to part 3 of this title shall be extended for a period of six months from the date of mailing of notice to the claimant by such Federal agency as to the final disposition of the claim or from the date of withdrawal of the claim from such Federal agency pursuant to section ~~410 of~~ this title, if it would otherwise expire before the end of such period."

Section 410 gave the claimants the right to withdraw a claim from a Federal agency by giving 15 days notice in writing.

The 1946 language was codified in 1948 by 62 Stat. 971 (80th Cong. 2nd sess) (June 25, 1948) in subsection b) in section 28 U.S.C. section 2401 to read as follows:

> "A tort claim against the United States shall be forever barred unless action is begun thereon within one year after

> such claim accrues, or unless, if it is a claim not exceeding $1,000, it is presented in writing to the appropriate Federal agency within one year after such claim accrues. If a claim not exceeding $1,000 has been presented in writing to the appropriate Federal agency within that period of time, suit thereon shall not be barred until after the expiration of a period of six months after either the date of withdrawal of such claim from the agency or the date of mailing notice by the agency of final disposition of the claim."

In 1949 a revision of the first sentence of 2401 (b) extended the one year period for most suits to 2 years, 63 Stat. 62 (81st Cong. 1st sess.) (May 6, 1949).

In 1959 all references to $1,000 were changed to $2,500. Pub.L. 86-238, 73 Stat. 472 (86th Cong. 1st sess.) (Sept 8, 1959).

In 1966 the text of section 2401(b) took its current form, by eliminating all distinctions to amounts below and above $2,500 and thus requiring submissions of all claims to the "appropriate Federal agency." Pub. L. 89-506, 80 Stat. 307, (89th Cong. 2nd sess.) (July 18, 1966).

B: Section 2675 statutory development

The statutory origin of the current text of 28 U.S.C. section 2675 began with section 420 quoted above and also with section 410 b) of 60 Stat. 844 (Aug. 2 1946) (79th Cong. 2nd sess) which read in part as follows:

> Sec. 410 b) .... No suit shall be instituted pursuant to this section upon a claim presented to any Federal agency pursuant to part 2 of this title unless such Federal agency has made final disposition of the claim: Provided , that the claimant may, upon 15 days' notice given in writing, withdraw the claim from consideration of the Federal agency and commence suit thereon pursuant to this section: ....

Part 2 of the title conferred the authority upon the head

of a federal agency or his designee to consider, ascertain, adjust, determine and settle claims for money damages for under $1,000. 60 Stat. 843

That section was codified by 62 Stat. 983, (80th Cong. 2nd sess) (June 25, 1948) in 28 U.S.C. section 2675. That section now read:

> 2675: Disposition by federal agency as prerequisite: evidence
>
> a) An action shall not be instituted upon a claim against the United States which has been presented to a federal agency, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of an employee of the government while acting within the scope of his authority, unless such federal agency has made final disposition of the claim.
>
> b) The claimant, however, may upon 15 days written notice, withdraw such claim from consideration of the federal agency and commence action thereon. Action under this subsection shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.
>
> c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

After a minor (and irrelevant) change in 1949 (63 Stat. 107, (May 24, 1949)), section 2675 took its current form in 1966 with the enactment of 80 Stat. 306, Pub. L. 89-506 (July 18, 1966).

It is worth noting that section 2675 as codified, with its internal and caption reference to various matters of evidence (limiting suits to the amount of the original demand unless a limited category of newly discovered evidence justifies exceptions) expands the scope of possible claims by an

individual. No language explicitly precludes suit. Moreover, the "evidence" caption unmistakably refers to subsections (b) and (c). If that caption is also read to refer to section (a), it would suggest that the proof of such agency notification was also an evidentiary matter, not a jurisdictional matter.

However, the close interrelationship between subsections (a) and (b) is best illustrated by the preconditions for filing suit involving claims under $1,000. Before instituting claims for such money damages a claimant was required to either have received the required final agency action (2675 (a)), or alternatively submit a fifteen day written notice of withdrawal of the claim (2675 (b)). In either case a document would be available to demonstrate statutory compliance - either a copy of the final agency denial or else the written withdrawal notice. It is reasonable that Congress did not intend a particular procedural trap for those unversed in the law by the language of section 2675 (a) but instead intended that the fact of withdrawal from the agency and/or final agency action be evidenced to the court. Recall the statement by the Congressional Committee Report rejecting pleas by various federal agencies for retaining the shorter (one year F.T.C.A.) statute of limitations, "No clear distinction can be seen between the accessibility of defenses to the Government than to ordinary law or private defendants." (1949 WL 1677, p.5) That statement explicitly rejects the concept of "special" treatment for the federal government as defendant.

C: Summary Overview of Changes in the F.T.C.A.

The series of amendments to the Federal Tort Claims Act

produced the following results regarding the statute of limitations and the right to commence actions involving notifications of federal agencies:

1946: Act passed. One year statute of limitation. Claims under $1,000 must be submitted to Federal agency which can settle them. Suit on such claims cannot be brought until notice of final disposition is sent to claimant, who then has been given 6 months from date of mailing notice to file suit if the one year statute of limitations would expire during that six month time period. A claim may be withdrawn by giving 15 days written notice. Other suits may proceed directly to court.

1948: Codification. No major substantive changes. However, the six months period for filing suit on claims under $1,000 now runs either from the date of withdrawal of such claim from the agency or the date of mailing notice by the agency of final disposition of the claim.

1949: Statute of limitations changed to 2 years.

1959: The requirement of presentation of a claim to an agency now covers claims up to $2,500 (which also can be determined and thus settled by the agency head). The agency is still required to finally dispose of each claim. The only alternative path into court requires submission of a 15 days' notice in writing of the withdrawal of a claim. Suit may then be filed.

1966: All distinctions between amounts of the claim for purposes of notifying the agency prior to suit eliminated. Now all claims must be notified in writing to a federal agency. The

agency head has expanded power to settle claims. The fifteen day withdrawal procedure was eliminated. If after submission of a written claim, six months have passed and no final action has been taken, the claimant now has the right to sue.

D: The definitions of "Institute" and "Commence" do not support identical treatment of RCRA and F.T.C.A.

The dictionary definitions of the words institute and commence are consistent with Congress intending a different meaning to be given to the two words in the F.T.C.A. and in RCRA.

Websters Seventh New Collegiate Dictionary (1971) defines the verbs commence and institute as follows:

Institute 1: to establish in a position or office 2 a : to originate and get established : ORGANIZE b : INAUGURATE, INITIATE

Commence (verb transitive) 1 : to enter upon : BEGIN 2 : to initiate formally by performing the first act of (verb intransitive) 1 : to have a beginning : START 2 : chiefly Brit.: to begin to be or to act as 3 : chiefly Brit. : to take a degree at a university (syn) see BEGIN

The terms are not identical, albeit they are similar, as illustrated by the reference to "initiate" in both definitions. However, the reference to "finally initiate" in the definition of commence captures the precise use of "commence" in the Federal Rules of Civil Procedure, and as construed in Hallstrom. However, such a reference does not occur with respect to "Institute" the language of F.T.C.A. section 2675.

There is a significant difference between such "final initiation" i.e. filing of a complaint, and the looser requirements of "to originate and get established, organize, inaugurate, initiate." Commence implies a more precise point of

time than does institute. To organize, except for the simplest process, involves a period of time, ofttimes a prolonged period of time. For example, the invasion of Nazi dominated France "commenced" on D-Day, however, it makes sense to assert that it was instituted months or years earlier by the planning process and the process of bringing men and material together to "commence" the physical landings on the beaches from ships or behind the coast through parachutes and gliders. Similarly, it is proper usage to describe the resupply of ammunition and other goods after D-Day prior to the break out of the beach fronts as part of the "institution" of the invasion of Nazi occupied France. One could not say, however, that such resupply "commenced" the invasion.

Conclusion

Wherefore the Plaintiff-Appellant respectfully requests that this court rehear this case and suggests a rehearing en banc.

Respectfully submitted,

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May 27, 1992

Appendix of Statutes At Large, Public Laws, and U.S.C.A Sections

60 Stat. 843, (August 2, 1946) (79th Cong. 2nd sess). . . . . A - 2

Section 410 (b), 60 Stat. 844 (Aug. 2 1946) (79th Cong. 2nd sess) . . . . . A - 3

Section 420, 60 Stat. 845 (August 2, 1946) (79th Cong. 2nd sess). . . . . A - 4

62 Stat. 971 (June 25, 1948) (80th Cong. 2nd sess). . A - 5

62 Stat. 983, (June 25, 1948) (80th Cong. 2nd sess). . A - 6

63 Stat. 62 (May 6, 1949) (81st Cong. 1st sess.). . . A - 7

63 Stat. 107 (May 24, 1949) (81st Cong. 1st sess) . . A - 8

Pub.L. 86-238, 73 Stat. 472 (Sept 8, 1959) (86th Cong. 1st sess.) . . . . . A - 9

Pub. L. 89-506, 80 Stat. 306, (July 18, 1966) (89th Cong. 2nd sess) . . . . . A - 10

Pub. L. 89-506, 80 Stat. 307, (July 18, 1966) (89th Cong. 2nd sess) . . . . . A - 11

28 U.S.C. Section 2675 (1992 pocket part, U.S.C.A.) . . A - 12

28 U.S.C. Section 2675 (U.S.C.A. 1965) . . . . . A - 13

42 U.S.C. Section 6972 (b) . . . . . A - 14

Nonapplicability.

of any papers, periodicals, magazines, or other publications in which he has caused to be published any articles or editorials; and the proposed legislation he is employed to support or oppose. The provisions of this section shall not apply to any person who merely appears before a committee of the Congress of the United States in support of or opposition to legislation; nor to any public official acting in his official capacity; nor in the case of any newspaper or other regularly published periodical (including any individual who owns, publishes, or is employed by any such newspaper or periodical) which in the ordinary course of business publishes news items, editorials, or other comments, or paid advertisements, which directly or indirectly urge the passage or defeat of legislation, if such newspaper, periodical, or individual, engages in no further or other activities in connection with the passage or defeat of such legislation, other than to appear before a committee of the Congress of the United States in support of or in opposition to such legislation.

Compilation and printing of information.

(b) All information required to be filed under the provisions of this section with the Clerk of the House of Representatives and the Secretary of the Senate shall be compiled by said Clerk and Secretary, acting jointly, as soon as practicable after the close of the calendar quarter with respect to which such information is filed and shall be printed in the Congressional Record.

REPORTS AND STATEMENTS TO BE MADE UNDER OATH

SEC. 309. All reports and statements required under this title shall be made under oath, before an officer authorized by law to administer oaths.

PENALTIES

SEC. 310. (a) Any person who violates any of the provisions of this title, shall, upon conviction, be guilty of a misdemeanor, and shall be punished by a fine of not more than $5,000 or imprisonment for not more than twelve months, or by both such fine and imprisonment.

(b) In addition to the penalties provided for in subsection (a), any person convicted of the misdemeanor specified therein is prohibited, for a period of three years from the date of such conviction, from attempting to influence, directly or indirectly, the passage or defeat of any proposed legislation or from appearing before a committee of the Congress in support of or opposition to proposed legislation; and any person who violates any provision of this subsection shall, upon conviction thereof, be guilty of a felony, and shall be punished by a fine of not more than $10,000, or imprisonment for not more than five years, or by both such fine and imprisonment.

EXEMPTION

43 Stat. 1070. 2 U. S. C. §§ 241-256. Supp. V, § 251; 18 U. S. C. § 206.

SEC. 311. The provisions of this title shall not apply to practices or activities regulated by the Federal Corrupt Practices Act nor be construed as repealing any portion of said Federal Corrupt Practices Act.

TITLE IV—FEDERAL TORT CLAIMS ACT

PART 1—SHORT TITLE AND DEFINITIONS

SHORT TITLE

SEC. 401. This title may be cited as the "Federal Tort Claims Act".

DEFINITIONS

SEC. 402. As used in this title, the term—

(a) "Federal agency" includes the executive departments and independent establishments of the United States, and corporations

whose primary function is to act as, and while acting as, instrumentalities or agencies of the United States, whether or not authorized to sue and be sued in their own names: *Provided*, That this shall not be construed to include any contractor with the United States.

Contractor.

(b) "Employee of the Government" includes officers or employees of any Federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a Federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

(c) "Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

PART 2—ADMINISTRATIVE ADJUSTMENT OF TORT CLAIMS AGAINST THE UNITED STATES

CLAIMS OF $1,000 OR LESS

SEC. 403. (a) Subject to the limitations of this title, authority is hereby conferred upon the head of each Federal agency, or his designee for the purpose, acting on behalf of the United States, to consider, ascertain, adjust, determine, and settle any claim against the United States for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death, where the total amount of the claim does not exceed $1,000, caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death, in accordance with the law of the place where the act or omission occurred.

Finality of award.

(b) Subject to the provisions of part 3 of this title, any such award or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud, notwithstanding any other provision of law to the contrary.

Payments.

(c) Any award made to any claimant pursuant to this section, and any award, compromise, or settlement of any claim cognizable under this title made by the Attorney General pursuant to section 413, shall be paid by the head of the Federal agency concerned out of appropriations that may be made therefor, which appropriations are hereby authorized.

Appropriations authorized.

Release of claim.

(d) The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release by the claimant of any claim against the United States and against the employee of the Government whose act or omission gave rise to the claim, by reason of the same subject matter.

REPORT

SEC. 404. The head of each Federal agency shall annually make a report to the Congress of all claims paid by such Federal agency under this part. Such report shall include the name of each claimant, a statement of the amount claimed and the amount awarded, and a brief description of the claim.

PART 3—SUITS ON TORT CLAIMS AGAINST THE UNITED STATES

JURISDICTION

SEC. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the

United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees.

Liability of U. S.

Costs.

(b) The judgment in such an action shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the Government whose act or omission gave rise to the claim. No suit shall be instituted pursuant to this section upon a claim presented to any Federal agency pursuant to part 2 of this title unless such Federal agency has made final disposition of the claim: *Provided*, That the claimant may, upon fifteen days' notice given in writing, withdraw the claim from consideration of the Federal agency and commence suit thereon pursuant to this section: *Provided further*, That as to any claim so disposed of or so withdrawn, no suit shall be instituted pursuant to this section for any sum in excess of the amount of the claim presented to the Federal agency, except where the increased amount of the claim is shown to be based upon newly discovered evidence not reasonably discoverable at the time of presentation of the claim to the Federal agency or upon evidence of intervening facts, relating to the amount of the claim. Disposition of any claim made pursuant to part 2 of this title shall not be competent evidence of liability or amount of damages in proceedings on such claim pursuant to this section.

Judgment as bar to action against employee of Government.

Withdrawal of claim.

PROCEDURE

SEC. 411. In actions under this part, the forms of process, writs, pleadings, and motions, and the practice and procedure, shall be in accordance with the rules promulgated by the Supreme Court pursuant to the Act of June 19, 1934 (48 Stat. 1064); and the same provisions for counterclaim and set-off, for interest upon judgments, and for payment of judgments, shall be applicable as in cases brought in the United States district courts under the Act of March 3, 1887 (24 Stat. 505).

28 U. S. C. §§ 723b, 723c; Supp. V, § 723c.

28 U. S. C. §§ 230 note, 216 note, 761-768.

REVIEW

SEC. 412. (a) Final judgments in the district courts in cases under this part shall be subject to review by appeal—

(1) in the circuit courts of appeals in the same manner and to the same extent as other judgments of the district courts; or

(2) in the Court of Claims of the United States: *Provided*, That the notice of appeal filed in the district court under rule 73 of the Rules of Civil Procedure shall have affixed thereto the written consent on behalf of all the appellees that the appeal be taken to the Court of Claims of the United States. Such appeals to the Court of Claims of the United States shall be taken within

Circuit courts of appeal.

Court of Claims.

28 U. S. C. foll. § 723c.

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three months after the entry of the judgment of the district court, and shall be governed by the rules relating to appeals from a district court to a circuit court of appeals adopted by the Supreme Court pursuant to the Act of June 19, 1934 (48 Stat. 1064). In such appeals the Court of Claims of the United States shall have the same powers and duties as those conferred on a circuit court of appeals in respect to appeals under section 4 of the Act of February 13, 1925 (43 Stat. 939).

28 U. S. C. §§ 723b, 723c; Supp. V, § 723c.

28 U. S. C. § 225.

(b) Sections 239 and 240 of the Judicial Code, as amended, shall apply to cases under this part in the circuit courts of appeals and in the Court of Claims of the United States to the same extent as to cases in a circuit court of appeals therein referred to.

28 Stat. 1127; 28 U. S. C. §§ 346, 347.

COMPROMISE

SEC. 413. With a view to doing substantial justice, the Attorney General is authorized to arbitrate, compromise, or settle any claim cognizable under this part, after the institution of any suit thereon, with the approval of the court in which such suit is pending.

PART 4—PROVISIONS COMMON TO PART 2 AND PART 3

ONE-YEAR STATUTE OF LIMITATIONS

SEC. 420. Every claim against the United States cognizable under this title shall be forever barred, unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, it is presented in writing to the Federal agency out of whose activities it arises, if such claim is for a sum not exceeding $1,000; or unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, an action is begun pursuant to part 3 of this title. In the event that a claim for a sum not exceeding $1,000 is presented to a Federal agency as aforesaid, the time to institute a suit pursuant to part 3 of this title shall be extended for a period of six months from the date of mailing of notice to the claimant by such Federal agency as to the final disposition of the claim or from the date of withdrawal of the claim from such Federal agency pursuant to section 410 of this title, if it would otherwise expire before the end of such period.

EXCEPTIONS

SEC. 421. The provisions of this title shall not apply to—

Act, etc., in execution of statute.

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused.

Loss of letters, etc.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

Assessment of tax, etc.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

Suits in admiralty.

41 Stat. 523; 46 U. S. C., Supp. V, § 741. 43 Stat. 1112.

(d) Any claim for which a remedy is provided by the Act of March 9, 1920 (U. S. C., title 46, secs. 741-752, inclusive), or the Act of March 3, 1925 (U. S. C., title 46, secs. 781-790, inclusive), relating to claims or suits in admiralty against the United States.

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service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

§ 2672. Administrative adjustment of claims of $1,000 or less

The head of each federal agency, or his designee for the purpose, acting on behalf of the United States, may consider, ascertain, adjust, determine, and settle any claim for money damages of $1,000 or less against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Finality of award.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award or determination shall be final and conclusive on all officers of the government, except when procured by means of fraud.

Post, p. 984.

Any award made pursuant to this section, and any award, compromise, or settlement made by the Attorney General pursuant to section 2673 of this title, shall be paid by the head of the federal agency concerned out of such agency's appropriations therefor, which appropriations are hereby authorized.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

§ 2673. Reports to Congress

Supra.

The head of each federal agency shall report annually to Congress all claims paid by it under section 2672 of this title, stating the name of each claimant, the amount claimed, the amount awarded, and a brief description of the claim.

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

§ 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States which has been presented to a federal agency, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of an employee of the government while acting within the scope of his authority, unless such federal agency has made final disposition of the claim.

(b) The claimant, however, may, upon fifteen days written notice, withdraw such claim from consideration of the federal agency and

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[CHAPTER 92]

AN ACT

April 25, 1949 (H. R. 779) [Public Law 53]

To amend title 28 of the United States Code to provide additional time for bringing suit against the United States in the case of certain tort claims, and for other purposes.

Title 28, United States Code, amendments. 62 Stat. 971. 28 U. S. C., Supp. II, § 2401 (b).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of section 2401 (b) of title 28 of the United States Code is hereby amended to read as follows: "A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later, or unless, if it is a claim not exceeding $1,000, it is presented in writing to the appropriate Federal agency within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later."

62 Stat. 933. 28 U. S. C., Supp. II, § 1346 (b). Post, p. 101. 62 Stat. 982. 28 U. S. C., Supp. II, §§ 2671-2680. Post, pp. 104, 107, 444.

SEC. 2. (a) Section 1346 (b) of title 28 of the United States Code is hereby amended to read as follows:

"(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

62 Stat. 963. 28 U. S. C., Supp. II, § 2672. Post, p. 106.

(b) The first paragraph of section 2672 of title 28 of the United States Code is hereby amended to read as follows:

"The head of each Federal agency, or his designee for the purpose, acting on behalf of the United States, may consider, ascertain, adjust, determine, and settle any claim for money damages of $1,000 or less against the United States accruing on and after January 1, 1945, for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Approved April 25, 1949.

[CHAPTER 93]

AN ACT

May 6, 1949 (H. R. 4152) [Public Law 56]

To approve repayment contracts negotiated with the Bitter Root irrigation district, the Shasta View irrigation district, the Okanogan irrigation district, the Willwood irrigation district, the Uncompahgre Valley Water Users Association, and the Kittitas reclamation district, to authorize their execution, and for other purposes.

Irrigation districts. Approval of repayment contracts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the contracts referred to in sections 2 to 7, inclusive, of this Act, which have been negotiated by the Secretary of the Interior and reported on as provided in subsections (a) and (c) of section 7 of the Reclamation Project Act of 1939 (53 Stat. 1187), are hereby approved and the

53 Stat. 1192. 43 U. S. C. § 485f (a), (c).

62 Stat. 764. 28 U. S. C., Supp. II, § 2673 (b).

SEC. 126. The second sentence of subsection (b) of section 2673 of title 28, United States Code, is amended by striking out the word "subsection" appearing therein and inserting in lieu thereof the word "section".

28 U. S. C., Supp. II, § 451 note.

SEC. 127. Section 32 of the Act of June 25, 1948, chapter 646, 62 Stat. 991, is amended to read as follows:

"SEC. 32. (a) All laws of the United States in force on September 1, 1948, in which reference is made to a 'circuit court of appeals'; 'senior circuit judge'; 'senior district judge'; 'presiding judge': 'chief justice', except when reference to the Chief Justice of the United States is intended: or 'justice', except when used with respect to a justice of the Supreme Court of the United States in his capacity as such or as a circuit justice, are hereby amended by substituting 'court of appeals' for 'circuit court of appeals'; 'chief judge of the circuit' for 'senior circuit judge'; 'chief judge of the district court' for 'senior district judge'; 'chief judge' for 'presiding judge'; 'chief judge' for 'chief justice', except when reference to the Chief Justice of the United States is intended; and 'judge' for 'justice', except when the latter term is used with respect to a justice of the Supreme Court of the United States in his capacity as such or as a circuit justice.

"(b) All laws of the United States in force on September 1, 1948, in which reference is made to the Supreme Court of the District of Columbia or to the District Court of the United States for the District of Columbia are amended by substituting 'United States District Court for the District of Columbia' for such designations.

"(c) All laws of the United States in force on September 1, 1948, in which reference is made to the 'Conference of Senior Circuit Judges', or to the 'Judicial Conference of Senior Circuit Judges' are amended by substituting 'Judicial Conference of the United States' for such designations.

"(d) This section shall not be construed to amend historical references to courts or judicial offices which have no present or future application to such courts or offices.".

53 Stat. 164. 26 U. S. C., Supp. II, § 1141 (a).

SEC. 128. Subsection (a) of section 1141 of the Internal Revenue Code (26 U. S. C., sec. 1141 (a)), as amended, is amended by striking out the words "circuit courts of appeals and the United States Court of Appeals for the District of Columbia", appearing in such subsection, and substituting in lieu thereof "courts of appeals".

61 Stat. 643. 4 U. S. C., Supp. II, prec. § 101.

SEC. 129. (a) The analysis of chapter 4, immediately preceding section 101 of title 4 of the United States Code, entitled, "Flag and Seal, Seat of Government, and the States", is amended by inserting, immediately after and below item 110, the following new item:

"111. Compacts between States for cooperation in prevention of crime; consent of Congress.".

61 Stat. 643. 4 U. S. C., Supp. II, § 110.

(b) Such title 4 of the United States Code is further amended by inserting, immediately following section 110, a new section, as follows:

"§ 111. Compacts between States for cooperation in prevention of crime; consent of Congress

"The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts.".

SEC. 130. Clause (1) of subdivision c of section 14 of the Act of July 1, 1898 (ch. 541, 30 Stat. 550; 11 U. S. C., sec. 32, subd. c. cl. (1)), as

28 U S C 2671-2680.

(2) The analysis of chapter 171 is amended by striking out the following item:

"2672. Administrative adjustment of claims of $1,000 or less."

and by inserting the following item in place thereof:

"2672. Administrative adjustment of claims of $2,500 or less."

62 Stat. 971.

(3) Subsection (b) of section 2401 of title 28, United States Code, is amended by striking out "$1,000" wherever it appears in such subsection, and by inserting in lieu thereof "$2,500".

Approved September 8, 1959.

Public Law 86-239

AN ACT

September 8, 1959 (H. R. 7373)

To amend section 801 of title 38, United States Code, to provide assistance in acquiring specially adapted housing to an additional group of severely disabled veterans.

Veterans, Housing grants for disabled. 72 Stat. 1168.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 801 of title 38, United States Code is amended to read as follows:

"§ 801. Veterans eligible for assistance

"The Administrator is authorized, under such regulations as he may prescribe, to assist any veteran, who is entitled to compensation under chapter 11 of this title, based on service after April 20, 1898, for permanent and total service-connected disability—

"(1) due to the loss, or loss of use, of both lower extremities, such as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair, or

"(2) which includes (A) blindness in both eyes, having only light perception, plus (B) loss or loss of use of one lower extremity, and such permanent and total disability is such as to preclude locomotion without the aid of a wheelchair,

in acquiring a suitable housing unit with special fixtures or movable facilities made necessary by the nature of the veteran's disability, and necessary land therefor. The regulations of the Administrator shall include, but not be limited to, provisions requiring findings that (1) it is medically feasible for such veteran to reside in the proposed housing unit and in the proposed locality; (2) the proposed housing unit bears a proper relation to the veteran's present and anticipated income and expenses; and (3) the nature and condition of the proposed housing unit are such as to be suitable to the veteran's needs for dwelling purposes."

Approved September 8, 1959.

Public Law 86-240

AN ACT

September 9, 1959 (S. 669)

To authorize the Secretary of Agriculture to convey certain lands to the Bethel Baptist Church of Henderson, Tennessee.

Bethel Baptist Church, Tenn. Conveyance. 50 Stat. 525-533. 7 USC 1010-1012, 1014-1029 passim.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, (a) notwithstanding the provisions of title III and title IV of the Bankhead-Jones Farm Tenant Act, the Secretary of Agriculture is authorized and directed to convey to the Bethel Baptist Church, Henderson, Tennessee, by quitclaim deed all right, title, and interest of the United

Public Law 89-506

July 18, 1966
[H. R. 13650]

AN ACT

To amend the Federal Tort Claims Act to authorize increased agency consideration of tort claims against the Government, and for other purposes.

Federal Tort Claims Act, amendment.
63 Stat. 62; 73 Stat. 471.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, (a) That the first paragraph of section 2672 of title 28, United States Code, is amended to read as follows:

"The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: *Provided*, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee."

Finality of award.
62 Stat. 983.

(b) The second paragraph of section 2672 of title 28, United States Code, is amended to read as follows:

"Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud."

Payment of award.

(c) The third paragraph of section 2672 of title 28, United States Code, is amended to read as follows:

"Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter."

Disposition by Federal agency as prerequisite.

SEC. 2. (a) Subsection (a) of section 2675 of title 28, United States Code, is amended to read as follows:

"(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim."

28 USC app.

(b) Subsection (b) of section 2675 of title 28, United States Code, is amended by deleting the first sentence thereof.

Compromise.
62 Stat. 984.
63 Stat. 62.

SEC. 3. Section 2677 of title 28, United States Code, is amended to read as follows:

"The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon."

Attorney fees, penalty.
28 USC 2678.

SEC. 4. The first paragraph of section 2678 of title 28, United States Code, is amended to read as follows:

"No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title."

Ante, p. 306.

Exclusiveness of remedy.

SEC. 5. (a) Subsection (b) of section 2679 of title 28, United States Code, is amended to read as follows:

"(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim."

Certain malpractice and negligence suits.
79 Stat. 1156.

(b) Subsection (a) of section 4116 of title 38, United States Code, is amended to read as follows:

"(a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death allegedly arising from malpractice or negligence of a physician, dentist, nurse, pharmacist, or paramedical (for example, medical and dental technicians, nursing assistants, and therapists) or other supporting personnel in furnishing medical care or treatment while in the exercise of his duties in or for the Department of Medicine and Surgery shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or his estate) whose act or omission gave rise to such claim."

Judgments and compromise settlements against U.S., appropriations.

SEC. 6. Section 1302 of the Act of July 27, 1956, as amended (70 Stat. 694, 75 Stat. 416; 31 U.S.C. 724a), is further amended (1) by inserting a comma and the word "awards," after the word "judgments" and before the word "and"; (2) by deleting the word "or" after the number "2414" and inserting in lieu thereof a comma; and (3) by inserting after the number "2517" the phrase ", 2672, or 2677".

Time for commencing action.

SEC. 7. Subsection (b) of section 2401 of title 28, United States Code, is amended to read as follows:

"(b) a tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented."

"Federal agency."

SEC. 8. The first sentence of section 2671 of title 28, United States Code, is amended to read as follows: "As used in this chapter and sections 1346(b) and 2401(b) of this title, the term 'Federal agency' includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States."

§ 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

(As amended July 18, 1966, Pub.L. 89-506, § 2, 80 Stat. 306.)

HISTORICAL AND STATUTORY NOTES

1966 Amendment

Subsec. (a). Pub.L. 89-506, § 2(a), required that all administrative claims be filed with the agency or department and finally denied by the agency and sent by certified or registered mail prior to the filing of a court action against the United States, provided that the claimant be given the option of considering the claim to have been denied if the agency fails to make final disposition of the claim within six months of presentation of the claim to the agency, and provided that the requirements of the subsection would not apply to claims asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

Subsec. (b). Pub.L. 89-506, § 2(b), deleted provisions under which a claimant could, upon 15 days written notice, withdraw a claim from the agency and institute an action thereon.

Effective Date of 1966 Amendment

Amendment of section by Pub.L. 89-506 applicable to claims accruing six months or more after July 18, 1966, see section 10 of Pub.L. 89-506, set out as a note under section 2672 of this title.

Legislative History

For legislative history and purpose of Pub.L. 89-506, see 1966 U.S. Code Cong. and Adm. News, p. 2515.

FEDERAL PRACTICE AND PROCEDURE

Exceptions to sovereign immunity, see Wright, Miller & Cooper: Jurisdiction § 3656 et seq.

Joinder of individuals as codefendants with United States, see Wright & Miller: Civil § 1658.

Severance of claims under rule pertaining to misjoinder and non-joinder of parties, see Wright & Miller: Civil § 1689.

WEST'S FEDERAL FORMS

Complaint for negligence—
- Generally, see § 1777 and Comment thereunder.
- Injuries to child who pulled mailbox over on himself, see § 1781.
- Liability of Federal Aviation Administration in arranging for publication of inaccurate charts, see § 1603.1 and Comment thereunder.

Operations performed in Veterans' Administration hospital, see § 1779.

WEST'S FEDERAL PRACTICE MANUAL

Claims against Postal Service, see § 2564
Procedure, see § 2003 et seq.

CODE OF FEDERAL REGULATIONS

Claims against United States, generally, see 32 CFR 536.1 et seq.

LAW REVIEW COMMENTARIES

Federal tort claims at the agency level: The FTCA administrative process. George A. Bermann. 35 Case W.Res.L.Rev. 509 (1984-85).

United States v. Varig: Can the King only do little wrongs? Thomas H. (Speedy) Rice (1983) 22 C.W.L.R. 175.

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Section 1346 of this the United States wi with this section mean tive remedies a prem van v. U.S., D.C.W.

1. Construction

Statute which mak Claims Act (FTCA) a against the United S presents his claim to and claim is denied Meridian Intern. Ltd. (Cal.) 1991, 939 F.2d

Requirement that appropriate federal ag by that agency before against United States tion 1346(b) of this cannot be waived

IN THE UNITED STATES
SUPREME COURT
OCTOBER TERM, 1992

NO:

WILLIAM McNEIL,
PETITIONER

V.

UNITED STATES OF AMERICA,
RESPONDENT

CERTIFICATE OF SERVICE

I, ALLEN E. SHOENBERGER, DO HEREBY CERTIFY THAT I
THIS DAY MAILED COPIES OF THE PETITION FOR CERTIORARI AND
FOR LEAVE TO APPEAL IN FORMA PAUPERIS IN THIS CASE TO:

THE SOLICITOR GENERAL OF THE UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

Eileen M. Marutsky, AUSA
Office of the United States Attorney
Criminal Division
219 S. Dearborn St.,
Chicago, Ill. 60604

postage prepaid.

September 18, 1992.

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